Supreme Court, U.S.
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Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below erred in determining—in conflict with this Court and multiple courts of appeals—that the causation standard for employee *contributory negligence* under the Federal Employers Liability Act ("FELA") differs from the causation standard for railroad *negligence*.

2. Whether, under the comparative negligence scheme of FELA, state courts may rely upon a jury instruction and verdict form mandated by state law that make it impossible for defendants and courts to determine whether and to what extent a jury found contributory negligence on the part of the plaintiff, and which treat FELA defendants differently from all other litigants.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

RULE 29.6 STATEMENT

Norfolk Southern Railway Company has a parent company, the Norfolk Southern Corporation, which is publicly traded. No other publicly held company owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norfolk Southern Railway Company ("Norfolk Southern") respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The order of the Missouri Court of Appeals affirming the judgment of the trial court is published at 170 S.W.3d 35 (Mo. Ct. App. 2005) (per curiam), and is reproduced in the Petition Appendix ("Pet. App.") at 1a-2a. That order was accompanied by an unpublished opinion, which is reproduced at Pet. App. 3a-21a. The Missouri Court of Appeals' order denying rehearing and/or transfer to the Missouri Supreme Court is reproduced at Pet. App. 32a. The order of the Missouri Supreme Court denying an application for transfer from the Missouri Court of Appeals is reproduced at Pet. App. 31a.

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on July 5, 2005. Pet. App. 1a. The Missouri Court of Appeals denied rehearing and transfer to the Missouri Supreme Court on August 22, 2005. Pet. App. 32a. The Missouri Supreme Court denied transfer on September 20, 2005. Pet. App. 31a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, are reproduced at Pet. App. 33a-34a. Missouri Approved Instructions ("MAI") 8.02, 24.01, 32.07(B), 36.01 and 37.07 are reproduced at Pet. App. 35a-38a.

STATEMENT OF THE CASE

Under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60, state courts have jurisdiction over personal injury claims brought by railroad employees against their employer, but those courts must apply the common law "'as established and applied in the federal courts.'" *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). This Court has admonished the Missouri courts that the Missouri Approved Instructions ("MAI") promulgated by the Missouri Supreme Court may not be employed to defeat federal substantive rights established by FELA. *St. Louis S.W. Ry. Co.* v. *Dickerson*, 470 U.S. 409, 411 (1985) (per curiam). But that is exactly what the Missouri court did below. It refused to follow the rule uniformly applied in the federal courts that the same causation standard governs claims of railroad negligence and employee contributory negligence. The state court did so for the sole reason that the federal rule conflicted with an MAI, which it held was binding upon state trial courts even in FELA cases.

The court below also impermissibly invoked the MAI to deny Norfolk Southern its federal right to determine whether the jury properly diminished damages for contributory negligence. See 45 U.S.C. § 53; *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 121-22 (1913). The state court's ruling on these points is not only flatly contrary to *Dickerson*, but also has created a substantial conflict of authority with federal courts of appeals and state supreme courts.

Certiorari is warranted to resolve the fundamental conflicts of authority regarding the administration of FELA. Alternatively, the proper resolution of the first question presented is so plain, and the conflict with this Court's precedent so egregious, that the Court may wish to consider summary reversal.

A. Statutory Background

FELA is the exclusive remedial scheme for practically all railroad workplace injuries. Because of FELA, there is no worker's compensation program for railroad employees. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994); *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 538-39 (1957) (Frankfurter, J., dissenting). Moreover, FELA broadly preempts state tort statutes that would otherwise apply to such injuries. *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 55 (1912). Accordingly, the causation standards at issue here implicate nearly every case involving an employee's injury while employed by a railroad.

Section 1 of FELA makes "[e]very common carrier by railroad . . . liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Absent an express statutory departure, the requisite elements of a FELA cause of action are determined by the common law "'as established and applied in the federal courts.'" *Urie*, 337 U.S. at 174.

One such departure from the common law concerns contributory negligence. Section 3 of FELA provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. Congress thus "substitut[ed] comparative negligence for the strict rule of contributory negligence" under traditional common law, whereby a plaintiff whose negligence contributed to his injury was foreclosed from any recovery. *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 62 (1943). This modification of the common-law rule was motivated by concerns of simple justice: It made "each party responsible for his own negligence, and require[d] each to bear the burden thereof." H.R. Rep. No. 60-1386, at 1 (1908); see also *id.* at 5 ("What can be

more fair than that each party shall suffer the consequences of his own carelessness?").

B. Factual Background

Respondent Sorrell was employed as a trackman by Norfolk Southern. Trial Transcript ("Tr.") 393. As such, he was a "general laborer," and performed various jobs related to track maintenance. *Id.* at 393-94. On November 1, 1999, he drove a dump truck to pick up materials in Elkhart, Indiana, that would be used to repair rail crossings. *Id.* at 405, 409-10. He unloaded some of the materials at the first assigned crossing, *id.* at 410, and was on a gravel road headed for the next crossing when, according to Sorrell, another vehicle approached him, *id.* at 412. The approaching vehicle was another Norfolk Southern truck, driven by Norfolk Southern employee Keith Woodin. *Id.* at 418. Sorrell testified that he slowed down, and pulled far to the right because he did not believe the two trucks could pass one another. *Id.* at 413-14. Just as the trucks passed each other, he testified, his front tire dropped into a four-foot ditch, and the truck tipped over onto its side. *Id.* at 414-15.

Woodin provided a very different account. He testified that when he saw Sorrell approaching, he pulled his truck off the road, and was "basically stopped." Tr. at 239. Furthermore, he testified, Sorrell pulled his truck off the road when the two trucks were still 400-500 feet apart, and that was when Sorrell's wheel fell into the roadside ditch. *Id.* at 240. When he saw that happen, Woodin drove to Sorrell, in order to assist him. *Id.* at 241. At about the time that Woodin's truck approached Sorrell's, Sorrell's truck rolled over. *Id.* at 242. Simply put, Sorrell claimed that Woodin forced him off the road and Woodin testified that Sorrell drove himself into the ditch.

C. Proceedings Below

Sorrell brought suit under FELA, alleging that Norfolk Southern failed to provide him "a reasonably safe place to

work," "reasonably safe methods for work," "reasonably safe conditions for work," and "reasonably safe equipment, tools and appliances for work." First Am. Pet. 2 (L.F. 9).[1] He sought damages stemming from various claimed physical injuries, as well as medical expenses, lost wages, and pain and suffering. *Id.*[2] The case was tried to a jury and Norfolk Southern argued, *inter alia*, that Sorrell was contributorily negligent when he drove his truck into the ditch. See, *e.g.*, Tr. 666 (closing argument; noting "comparative fault"); *id.* at 666-67 (urging the jury to "consider the fault of Tim Sorrell"); see generally *id.* at 659-66 (discussing same).

Norfolk Southern asked the court to instruct the jury that the causation standard for Sorrell's own contributory negligence is identical to the causation standard for Norfolk Southern's negligence. Tr. 574-75 (Pet. App. 27a-28a). It argued that FELA employs a pure comparative fault system, which requires that the same standards of causation apply both to the plaintiff's and the defendant's negligence. *Id.* at 575 (Pet. App. 28a-29a). The judge rejected this request, because the Missouri Approved Instructions, which are approved by the Missouri Supreme Court, impose different standards of causation for the two forms of negligence. *Id.* at 576 (Pet. App. 29a). Missouri's approved instruction for railroad negligence requires only a finding that such negligence contributed "in whole or in part" to the plaintiff's injury. MAI 24.01 (Pet. App. 35a-36a).[3] By contrast, the approved instruction regard-

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[1] "LF" citations are to the "Legal File" submitted to the Missouri Court of Appeals, which contains excerpts of the trial record.

[2] Sorrell also brought a second cause of action related to an injury that he purportedly suffered while using a tamping tool. First Am. Pet. 3 (L.F. 10). The jury awarded no damages on that claim, and it is not before this Court. *See* Verdict (Pet. App. 25a); Judgment (Pet. App. 22a-23a).

[3] MAI 24.01 requires that the jury be instructed as follows:

Your verdict must be for plaintiff if you believe:

ing the plaintiff's contributory negligence requires defendants to meet the heavier burden of showing that the plaintiff's negligence "*directly* contributed to cause his injury." MAI 32.07(B) (Pet. App. 36a) (emphasis added).[4]

Norfolk Southern also asked the court to instruct the jury to specify whether it found Sorrell to have been contributorily negligent and if so, in what proportion. Tr. 576-78 (Pet. App. 29a-30a); see also Defendant's Objections to the Use of MAI 8.02 and MAI 36.01 as Violating the United States Constitution (L.F. 35-42). That is the normal practice in Missouri in personal injury cases involving comparative negligence claims. See MAI 37.07 (Pet. App. 37a-38a). The Missouri Approved Instruction regarding FELA is different; it does not require the jury to specify this information. See MAI 8.02 (Pet App. 35a). Norfolk Southern argued that, unless the jury provides this information, a FELA defendant cannot discern whether and to what extent the jury found contributory negligence, and the courts cannot ensure that the jury faithfully

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First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce, and

Second, [with respect to such conditions for work,] defendant either failed to provide: reasonably safe conditions for work, or reasonably safe appliances, or reasonably safe methods of work, or reasonably adequate help, and

Third, defendant in any one or more the respects submitted in Paragraph Second was negligent, and

Fourth, such negligence resulted in whole or in part in [injury to plaintiff] [the death of (*decedent's name*)].

[4] MAI 32.07(B) requires that the jury be instructed as follows:

You must find plaintiff contributorily negligent if you believe:

First, plaintiff (characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"), and

Second, plaintiff was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

followed FELA's command that a plaintiff's damages be reduced "in proportion to [the employee's] negligence," 45 U.S.C. § 53. Accordingly, Norfolk Southern argued, the failure to provide such an instruction in FELA cases is contrary to FELA itself. Tr. 576-78 (Pet. App. 29a-30a); see Defendant's Objections to the Use of MAI 8.02 and MAI 36.01 as Violating the United States Constitution (L.F. 35-42). Because, however, the Missouri Approved Instruction does not require the jury to provide this information, the trial judge refused to instruct the jury to do so. Tr. 577, 578 (Pet. App. 30a).

The jury returned a verdict against Norfolk Southern in the amount of $1.5 million. In accordance with the jury instructions, the verdict form did not reflect whether the jury had determined that Sorrell was contributorily negligent nor, if so, the extent to which the jury may have reduced plaintiff's damages. See Verdict B (Pet. App. 26a).[5] Norfolk Southern's motion for a new trial was denied. L.F. 189.

On appeal, the Missouri Court of Appeals affirmed solely on the ground that the MAI was binding; it did not address what federal law requires. Pet. App. 7a. In rejecting Norfolk Southern's argument that the jury should have been asked to specify whether and to what extent it found comparative negligence, the court conceded that Missouri juries are required to do so in comparative negligence cases under state law, but nonetheless found that the MAI was binding and permitted only a general verdict in FELA cases. *Id.* at 17a.

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[5] The Petition Appendix includes both the Verdict form (Pet. App. 25a-26a), which was filled out by the jury, and the Judgment (*id.* at 22a-24a), which was completed by counsel after the verdict was announced. Pursuant to the judge's conclusions and MAI, the Verdict has no space for the jury to indicate contributory negligence. The Judgment has a space where contributory negligence can be specified, but this was never provided to the jury, and counsel of course left this space blank.

Norfolk Southern moved the Missouri Court of Appeals to rehear the case, or to transfer it to the Missouri Supreme Court, both of which motions were denied. Pet. App. 31a-32a. It then filed an Application for Transfer with the Missouri Supreme Court (which is similar in nature to a petition for a writ of certiorari, see Mo. Sup. Ct. R. 83.04). That application also was denied. Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

The Missouri Supreme Court has issued procedural rules binding on the state's lower courts—specifically, jury instructions regarding causation standards under FELA—that impermissibly defeat federal substantive rights. With regard to the standard of causation under FELA, the Missouri courts are alone in holding that different substantive standards of causation apply to a railroad defendant's negligence and a plaintiff employee's contributory negligence. This rule stands in conflict with every court to consider the issue, and with numerous jury instructions in the federal courts. The Missouri rule is indefensible under federal law, and the court below did not attempt such a defense. It simply fell back on the binding nature of the Missouri Approved Instructions as a matter of state law. But, this Court has already instructed the Missouri courts that the Missouri jury instructions may not be used to defeat substantive rights under FELA. See *Dickerson*, 470 U.S. at 411.

The Missouri court likewise invoked the MAI to deny special verdicts that are essential for courts to review juries' application of FELA's comparative negligence requirements. The mandatory general-verdict rule applied in Missouri impermissibly denies FELA defendants vindication of federal rights, discriminates against the assertion of federal rights, and is contrary to the rule of the federal courts of appeals. Accordingly, this Court should grant review.

I. MISSOURI'S JURY INSTRUCTIONS MAY NOT ABRIDGE THE FEDERAL RULE UNDER FELA THAT THE SAME CAUSATION STANDARDS APPLY TO RAILROAD AND EMPLOYEE NEGLIGENCE.

The Missouri Supreme Court has issued mandatory jury instructions that require the jury to apply divergent causation standards for railroad and employee negligence. The court below held that the MAI are binding notwithstanding the federal rule to the contrary. The decision below is contrary to the plain language of FELA and the apportionment rules recognized by this Court; creates a clear conflict with federal courts of appeals and state supreme courts; and runs directly afoul of this Court's precedents holding that Missouri courts may not rely on MAI in disregard of federal law.

1. As previously explained, under FELA Congress "substitut[ed] comparative negligence for the strict rule of contributory negligence." *Tiller*, 318 U.S. at 62 (1943). In operation, this system should be simple. So long as the employer's negligence is a legal cause of the plaintiff's injuries, it is liable in damages. If, however, the employee's own negligence is also a legal cause of his injuries, his damages are decreased in proportion to his fault. Each party is responsible for the proportion of damages caused by its proportionate fault.

This is precisely how this Court repeatedly has described the functioning of FELA's comparative negligence system for more than 90 years. In *Illinois Central Railroad* v. *Skaggs*, the Court approved a jury instruction that provided:

> if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame, and the plaintiff would be responsible himself to the extent to which he was to blame.

240 U.S. 66, 73 (1916).[6] *Skaggs*, and this Court's other precedents like it, do not even hint that the standards of causation for negligence and contributory negligence may differ. Rather, as these decisions recognize, the appropriate point of comparison is the parties' relative "blame"—i.e., their fault. "The orthodox view in negligence cases is that comparative negligence is just what it sounds like—a comparison of the negligence or culpability of each party, an idea easily understood as a comparison of the unjustified risks taken by each." 1 Dan B. Dobbs, *The Law of Torts* § 202, at 509 (2001).

The same causation standards have always applied to both defendant and plaintiff negligence, both under traditional contributory negligence rules and under modern comparative negligence schemes. "The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others." *Restatement (Second) of Torts* § 465(2) (1965); see also *Restatement (Third) of Torts: Apportionment of Liability* § 3 (1999) ("Plaintiff's negligence is defined by the applicable standard for a defendant's negligence.").[7]

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[6] *Accord Grand Trunk W. Ry.* v. *Lindsay*, 233 U.S. 42, 49 (1914) ("the damages are to be diminished in the proportion which [the plaintiff's] negligence bears to the combined negligence of himself and the carrier, —in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee"); *Earnest*, 229 U.S. at 121-22.

[7] *Accord Restatement (Second) of Torts* § 465 cmt.b:

> The rules which determine whether the causal relation between the plaintiff's conduct and his harm is such as to make the law regard it as a legally contributing cause and, therefore, ... sufficient to make his failure to exercise reasonable care for his own protection contributory negligence barring him from recovery against a negligent defendant, are the same as those which determine whether the conduct of the actor as defendant is sufficient to make him responsible and, therefore, liable for a harm to another.

Indeed, no other rule can logically apply in the comparative negligence scheme created by FELA.

> [W]here the *causal negligence* is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery *a proportional part of the damages corresponding to the employee's contribution to the total negligence.*

Seaboard Air Line Ry. v. *Tilghman*, 237 U.S. 499, 501 (1915) (emphases added). Thus, under FELA, the jury must determine the total "causal negligence" of both railroad and employee; apportion that total between the railroad and employee according to relevant fault; and award "a proportional part of the damages corresponding to the employee's contribution to the total negligence." *Id.*; *Earnest*, 229 U.S. at 122; see also *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 435-36 (1949). FELA presupposes that the causal negligence of the railroad and the employee can be summed and mathematically compared to the total, which would be nonsensical if different causation standards applied to the two types of negligence. Moreover, FELA is designed so that both the railroad and the employee "bear the burden" of their own negligence. H.R. Rep. No. 60-1386, at 1; *Skaggs*, 240 U.S. at 73 (under FELA "the plaintiff would be responsible himself to the extent to which he was to blame"). The FELA scheme of fair apportionment is thwarted when the plaintiff is relieved of his relative share of responsibility by applying a more exacting causation standard to evidence of his negligence than is applied to claims of railroad negligence.

In short, fault, not causation, is the relevant metric for apportioning financial responsibility for injury between the railroad and the employee. Causation is simply a "gatekeeping concept[]" that performs the same function for negligence and

contributory negligence—it "exclud[es] some negligence from consideration when it is not causal in fact and when it is too remote." 1 Dobbs, *supra*, § 202, at 509.[8] "But this does not mean that causation itself is somehow put on the scales and weighed." *Id.* Any other rule would be wildly impractical, because it would be "difficult to administer when different rules govern different parts of the same lawsuit." *Restatement (Third) of Torts: Apportionment of Liability* § 3 reporters note to cmt.a, at 37.

2. Without regard for the operation of the FELA comparative negligence scheme, the Missouri Supreme Court has required the lower Missouri courts to use jury instructions that employ different causation standards for negligence and contributory negligence under FELA. The Missouri Approved Instruction for FELA negligence requires that the railroad's "negligence resulted in whole or in part in [injury to plaintiff]." MAI 24.01 (footnote omitted) (brackets in original) (Pet. App. 36a). Although the instruction tracks the statutory language, see 45 U.S.C. § 51, the Missouri courts have interpreted the language of the statute and the instruction to abrogate the rule of proximate cause. *Leake* v. *Burlington N. R.R.*, 892 S.W.2d 359, 365 (Mo. Ct. App. 1995); *Snyder* v. *Chicago, Rock Island & Pac. R.R.*, 521 S.W.2d 161, 165 (Mo. Ct. App. 1973); *Wilmoth* v. *Chicago, Rock Island & Pac. R.R.*, 486 S.W.2d 631, 634 (Mo. 1972). But the Missouri Approved Instruction imposes a heavier burden of proving proximate cause for FELA *contributory negligence*. The plaintiff's own negligence must have "*directly* contributed to cause his injury." MAI 32.07(B) (emphasis added) (Pet. App. 36a); see *Leake*, 892 S.W.2d at 365 (instruction requiring "direct" causation requires proximate cause); *Snyder*, 521

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[8] *See also* 1 Dobbs, *supra*, § 201, at 504 ("[C]ourts in negligence cases ordinarily compare fault, not causation. Causation usually remains an all or nothing issue. Once it is established, the causal fault of the plaintiff is compared with the causal fault of the defendant.").

S.W.2d at 165 (same); *Fish* v. *Chicago Rock Island & Pac. Ry.*, 172 S.W. 340, 346 (Mo. 1914).

Importantly, Missouri's use of different causation standards for negligence and contributory negligence is the final, considered and binding position of the Missouri Supreme Court. Lower Missouri courts must employ them. *Bueche* v. *Kansas City*, 492 S.W.2d 835, 840 (Mo. 1973) ("It is well settled that when a MAI instruction is applicable, its use is mandatory.").[9] So although Norfolk Southern asked the trial court to employ a modified form of MAI 32.07(B) (the FELA instruction) that would mirror the causation standard in MAI 24.01 (the usual instruction), see Tr. 574-75 (Pet. App. 27a-28a); Pet. App. 6a-7a, the trial court declined to do so, and "suggest[ed]" that Norfolk Southern present its argument to the Jury Instruction Committee of the Missouri Supreme Court, Tr. 576 (Pet. App. 29a). The Missouri Court of Appeals likewise affirmed on the sole ground that the MAI are binding, Pet. App. 7a, and the Missouri Supreme Court denied review, *id.* at 31a.

3. Because divergent causation standards are irreconcilable with the FELA comparative negligence scheme, it is unsurprising that the decision below has created a sharp conflict with the federal courts of appeals and state supreme courts that have addressed the issue. The Third, Fifth and Sixth Circuits and the Oregon Supreme Court all have held that FELA's causation standards for negligence and contributory negligence are the same. In *Fashauer* v. *New Jersey Transit Rail Operations, Inc.*, the Third Circuit upheld a jury instruction that "[t]o determine whether the plaintiff was contributorily negligent, you apply the same definition of negligence [that applies to the defendant] .... You also apply the same

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[9] *See also* Order of Apr. 8, 2002 (Mo.) (en banc) ("The aforesaid forms *must* be used on and after January 1, 2003 ...." (emphasis added)); *accord* Mo. R. Civ. P. 70.02(b) ("Whenever Missouri Approved Instructions contains an instruction applicable in a particular case ..., such instruction shall be given to the exclusion of any other instructions on the same subject.").

rule of causation." 57 F.3d 1269, 1282 (3d Cir. 1995). The plaintiff had argued that the standards of causation that apply to plaintiffs and defendants should be different, but the Third Circuit, recognizing that such an argument is incompatible with FELA's comparative negligence scheme, held this argument to be "insubstantial." *Id.* at 1282; see also *Page* v. *St. Louis S.W. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965) ("we think the better rule is one of a single standard"); *Dixon* v. *First Cent. Co.*, 481 F.2d 833, 835 (6th Cir. 1973); *Ganotis* v. *New York Cent. R.R.*, 342 F.2d 767, 768-69 (6th Cir. 1965) ("We do not believe that the Act ... intended to make a distinction between proximate cause when considered in connection with the carrier's negligence and proximate cause when considered in connection with the employee's contributory negligence."); *Caplinger* v. *Northern Pac. Terminal*, 418 P.2d 34, 35-36 (Or. 1966).

Likewise, the model jury instructions in four courts of appeals employ the same standard for negligence and contributory negligence. These include the instructions in the Eighth Circuit (where Missouri is located), as well as the Fifth, Ninth and Eleventh Circuits. See *Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit* § 7.03 & n.7 (2001) ("A single standard of causation is to be applied to the plaintiff's negligence claim and the railroad's claim of contributory negligence.").[10]

The predicate rule in Missouri that FELA eliminates the proximate cause requirement for railroad negligence is con-

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[10] *See also Pattern Jury Instructions [Civil] for the Fifth Circuit* § 5.1 (1999) (defining both negligence and contributory negligence with regard to "legal cause"); *Ninth Circuit Manual of Model Civil Jury Instructions* §§ 8.1, 8.4, 8.7 (2004) (providing a singular definition for causation as "a cause of an injury or damage if it played any part, no matter how small, in bringing about the injury or damage"); *Eleventh Circuit Pattern Jury Instructions (Civil Cases)* § 7.1 (1999) (defining both negligence and contributory negligence with reference to the same definition of "legal cause").

trary to federal law, see *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923); *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944), but at a minimum this Court should not allow a substantial and unjustified circuit conflict to persist. This Court's intervention is imperative.

4. The Missouri courts' refusal to look beyond the Missouri Approved Instructions flies directly in the face of this Court's decision in *Dickerson*. In that case, just as here, the Missouri Court of Appeals held that the issuance of a certain jury instruction was required because it was mandated by the Missouri Approved Instructions. 470 U.S. at 411. This Court reversed in a per curiam decision. It held that although "FELA cases adjudicated in state courts are subject to state procedural rules, ... the substantive law governing them is federal." *Id.* Accordingly, the objection to the jury instruction "cannot be dismissed on the ground that such an instruction is not to be found in the Missouri Approved Instructions. Whether such an instruction should have been given is a federal question." *Id.*

This case stands in precisely the same posture. The Missouri Court of Appeals in this case, just as it did in *Dickerson*, erroneously permitted Missouri jury instructions to trump federal substantive law. And, as in *Dickerson*, its substantive conclusion was mistaken. There simply is no reasoned basis upon which to apply different causation standards to a defendant's negligence and a plaintiff's contributory negligence, as every court to consider the issue under federal law has determined. Accordingly, for the same reasons summary reversal was appropriate in *Dickerson*, it is likewise warranted here.

5. It is of paramount importance that this Court correct the Missouri court's stark disregard of *Dickerson* and its departure from federal law. FELA is intended to create a uniform federal remedy throughout the United States, see, *e.g.*, *New York Cent. R.R.* v. *Winfield*, 244 U.S. 147, 150 (1917), and a conflict on something so basic as causation standards is antithetical to that statutory purpose. FELA cases commonly pre-

sent questions of whether, and to what degree, railroad or employee negligence caused an injury. It is untenable for different rules to apply in different courts, depending on where the suit is brought. Moreover, as noted above, see *supra* at 14, the Eighth Circuit pattern jury instructions mandate a uniform standard for plaintiff and defendant causation, which conflicts directly with the Missouri Supreme Court's standard, and will cause forum shopping for substantive advantage even within a single state.

The need for this Court to correct Missouri's departure from well-established federal law is all the greater because Missouri is a hotbed of FELA litigation. FELA has a liberal venue rule that allows plaintiffs great latitude in choosing the forum in which to sue, see 45 U.S.C. § 56, and even out-of-state plaintiffs flock to St. Louis because of its reputation as a pro-plaintiff jurisdiction where juries award (and judges uphold) very large verdicts. *Report Names Madison County The Top "Judicial Hellhole" In U.S.*, St. Louis Bus. J., Nov. 6, 2003, *available at* http://stlouis.bizjounals.com/stlouis/stories/2003/11/03/daily59.html (citing study that named Saint Louis City Court as the 11th-worst jurisdiction for defendants in the country); see *State ex rel. Linthicum* v. *Calvin*, 57 S.W.3d 855, 859 (Mo. 2001) (Wolff, J., concurring in part and dissenting in part); Tim Bryant, *Missouri Supreme Court Judge Suggests Mixing City, County Jury Pools*, St. Louis Post Dispatch, Nov. 27, 2002.[11]

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[11] These difficulties are exacerbated by the fact that Missouri courts routinely deny forum non conveniens motions. *See, e.g., Anglim* v. *Missouri Pac. R.R.*, 832 S.W.2d 298 (Mo. 1992) (plaintiff resided in Nebraska and injuries occurred in Omaha, Nebraska); *Besse* v. *Missouri Pac. R.R.*, 721 S.W.2d 740 (Mo. 1986) (plaintiff resided in Kansas and injuries occurred in Wichita, Kansas); *State ex rel. Kansas City S. Ry.* v. *Mauer*, 998 S.W.2d 185 (Mo. Ct. App. 1999) (plaintiff resided in Foreman, Arkansas, and injuries occurred in Arkansas); *Eutón* v. *Norfolk & W. Ry.*, 936 S.W.2d 146 (Mo. Ct. App. 1996) (plaintiff resided in Ohio and injuries occurred in Portsmouth, Ohio); *Robertson* v. *Burlington N. & Santa Fe R.R.*, 785 S.W.2d 626 (Mo. Ct. App. 1990) (plaintiff resided in Arkansas

This case illustrates forum shopping at its worst. The accident and injury occurred in Indiana, and the plaintiff was from Indiana. Yet suit was filed in St. Louis City Court. If jury instructions are more favorable in Missouri than in other courts, unseemly and unfair forum shopping will only increase.

For all of these reasons, this Court's review, or in the alternative summary reversal, plainly is warranted.

II. MISSOURI'S MANDATORY GENERAL-VERDICT RULE IS CONTRARY TO PRECEDENTS OF THIS COURT AND FEDERAL COURTS OF APPEALS, AND IMPERMISSIBLY DISCRIMINATES AGAINST FEDERAL RIGHTS.

The first error set forth above was exacerbated by the court's failure to require the jury to indicate (through jury instructions or a verdict form) whether it found Sorrell to have been contributorily negligent and if so, to what extent. See Instruction No. 14 (L.F. 26); Verdict B (Pet. App. 26a). The Missouri rule that mandates this practice makes it impossible for courts to superintend defendants' statutory right to a reduction in damages for contributory negligence, in violation of FELA.

The lower courts' refusal to require the jury to specify its apportionment of damages resulted from the use of MAI 8.02, which applies exclusively to cases arising under FELA, and MAI 36.01, a general verdict form that could not be used in any comparative-fault case in Missouri other than one concerning FELA. (As discussed below, see *infra* at 22, the instructions and verdict form for every other personal injury case involving comparative negligence in Missouri are differ-

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and injuries occurred in Ft. Smith, Arkansas); *Melton* v. *Illinois Cent. Gulf R.R.*, 763 S.W.2d 321 (Mo. Ct. App. 1988) (plaintiff resided in Centralia, Illinois, and injuries occurred near Benton, Illinois); *Ingle* v. *Illinois Cent. Gulf R.R.*, 608 S.W.2d 76 (Mo. Ct. App. 1980) (plaintiff resided in Alabama and injuries occurred in Tuscaloosa, Alabama).

ent.) Pursuant to the FELA-specific instructions, the jury determines the percentage of fault attributable to the plaintiff and uses that percentage to offset damages (as FELA requires, see 45 U.S.C § 53), but does not specify on the verdict form whether it found contributory negligence, and if so, the percentage of fault that it attributes to the respective parties. Rather, the jury determines on its own how the gross damages should be reduced in proportion to the employee's negligence, and declares only the resulting, final figure on the verdict form.

As a practical matter, this means that in FELA cases in Missouri, the parties and the courts are unable to evaluate the jury's decision regarding contributory negligence. It is impossible to determine:

- Whether the jury found contributory negligence;
- If the jury did find negligence, in what proportion it apportioned fault between the plaintiff and the railroad defendant;
- Whether the procedure for FELA fault calculation, mandated by federal law, was followed; and
- Whether the jury made a mathematical mistake in reaching its calculation.

Post-trial review of jury verdicts under this scheme (for instance, to determine if a verdict is excessive or against the weight of the evidence) is simply rendered impossible.

1. The Missouri rule conflicts with the precedent of this Court and multiple lower courts. As noted above, in FELA cases in Missouri where contributory negligence is at issue, the jury *must* enter a general verdict. See MAI 8.02 (Pet. App. 35a). The official commentary to Missouri's jury instruction states that FELA requires that "the *jury* diminishes damages in proportion to the employee's negligence." MAI 8.02 comm. cmt. That is, it interprets FELA to mean that not only is the jury the decisionmaker for contributory negligence

under FELA; but it also must perform the relevant calculations, and it must do so in a fashion that cannot be reviewed by either the trial judge or an appellate court.

The premise of the MAI—that FELA requires jury application of statutory requirements that are undisclosed and immune from trial or appellate court review—has no basis in federal law. To be sure, under FELA, whether there was contributory negligence and the allocation of percentage of total negligence to the employee are matters of fact for the jury. 45 U.S.C. § 53. But, whether the jury properly applied the law governing the allocation of damages is for the court, not the jury.

The right under FELA to a proper allocation of damages to contributory negligence, plainly conferred by the statute, was recognized by this Court in *Norfolk & W. Ry. Co.* v. *Earnest*, 229 U.S. 114 (1913). In that case, the Court held that the jury must compare the contributory negligence to total causal negligence, not just to the defendant's negligence. *Id.* at 121-22. Yet, the right to lawful allocation of damages under FELA is frustrated by the Missouri rule, which makes it practically impossible to determine whether a jury found contributory negligence; if so, to what extent; and whether the jury properly diminished the plaintiff's damages.

Nor, in any case where there is a submissible issue on contributory negligence, can the statutory right to offset be vindicated by the usual expedient of reversing a general verdict. In most cases, it will be impossible even to determine whether a statutory violation has occurred (for instance, whether the jury miscalculated the reduction for contributory negligence). And, even if it were possible, sending a case back for retrial would do no good because under the Missouri rule, another general verdict would result. Under the Missouri rule, defendants cannot determine whether their statutory rights were violated, and trial courts on post-trial review, as well as appellate courts, cannot meaningfully superintend the jury's decisionmaking.

Missouri's mandatory general-verdict rule has no warrant in federal law, and the court below once again offered no justification for its decision other than that the MAI requires it. Pet. App. 17a-18a. But, as explained above, *Dickerson* holds that the Missouri Approved Instructions may not be used to frustrate federal rights under FELA. 470 U.S. at 411; accord *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952) ("State laws are not controlling in determining what the incidents of th[e] federal right [under FELA] shall be."). This rule is simply one specific application of the venerable principle that "federal right[s] cannot be defeated by the forms of local practice." *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294, 296 (1950); *American Ry. Expr. Co.* v. *Levee*, 263 U.S. 19, 21 (1923) ("The law of the United States cannot be evaded by the forms of local practice."); *Atlantic Coast Line R.R.* v. *Mims*, 242 U.S. 532, 536 (1917).

Missouri's mandatory general-verdict rule also is in conflict with the rule of various courts of appeals, which admonish trial courts to use special verdict forms to enable proper judicial review of jury comparative negligence determinations under FELA. See, *e.g.*, *Blue v. Western Ry. of Ala.*, 469 F.2d 487, 497 (5th Cir. 1972) ("We have no way of knowing to what extent the jury reduced its award for Blue on the basis of a finding of Blue's contributory negligence. Such a situation would and should have been avoided through the use of special interrogatories under Rule 49, Federal Rules of Civil Procedure."); *Koivunen* v. *State Line*, 371 F.2d 781, 783 (9th Cir. 1967); *Flener* v. *Louisville & Nashville Ry.*, 198 F.2d 77, 79 (7th Cir. 1952); *Wetherbee* v. *Elgin, Joliet & E. Ry.*, 191 F.2d 302, 310 (7th Cir. 1951). These cases indicate that a party should not be denied an appropriate special verdict form when, as in this case, such a form is necessary to vindicate the plaintiff's federal rights under FELA.[12]

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[12] Multiple appellate court decisions discuss the percentage by which a FELA plaintiff's damages were reduced on account of contributory negligence, information that is available to the appellate court only if, contrary

Moreover, unlike the MAI, the pattern jury instructions in four federal circuits (including the Eighth Circuit) require the jury in FELA cases to specify the plaintiff's percentage of contributory negligence. See *Pattern Jury Instructions [Civil] for the Fifth Circuit* § 5.1 (1999); *Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit* § 7.08; *Ninth Circuit Manual of Model Civil Jury Instructions* § 8.7 (2004) ("You must then write th[e] percentage [of the plaintiff's contributory negligence] on the appropriate place on the verdict form. *Do not make any reduction in the amount of damages that you award to the plaintiff. I will reduce the damages that you award by the percentage of negligence that you assign to the plaintiff.*" (emphasis added)); *Eleventh Circuit Pattern Jury Instructions (Civil Cases)* § 7.1 & Special Interrogatories (1999). The wooden MAI rules upheld by the court below have no basis in FELA and frustrate uniformity in the administration of federal law.

2. What makes the Missouri court's refusal to require juries to specify the comparative fault of the parties particularly outrageous is that this practice discriminates against FELA defendants. MAI has an entire chapter (Chapter 37) devoted to comparative fault cases, a damages instruction that tells the

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to the Missouri rule, the jury instructions and jury verdict require an enumeration of damages. These decisions—which arise out of courts in the Second, Third, Fifth, Seventh and Eighth Circuits—demonstrate further adherence to the majority rule, not the Missouri rule. *See Schadel* v. *Iowa Interstate R.R.*, 381 F.3d 671, 673 (7th Cir. 2004) (affirming a district court's decision where plaintiffs' damages were reduced by 50% for a finding of contributory negligence); *Fashauer*, 57 F.3d at 1273 (upholding the reduction of plaintiffs' damages by 50% based on the jury's finding of contributory negligence under FELA); *Stanislawski* v. *Upper River Servs., Inc.*, 6 F.3d 537, 540-41 (8th Cir. 1993) (examining a 75% reduction of damages in a Jones Act claim as a result of the jury's finding of contributory negligence on the part of plaintiff); *Akermanis* v. *Sea-Land Serv., Inc.*, 688 F.2d 898, 906-07 (2d Cir. 1982) (reversing and remanding a decision by a trial court to order a new trial based solely on the percent of damages attributable to plaintiffs' negligence without disturbing trial court's decision to reduce plaintiff's damages by that amount).

jury to write out the percentages of fault (MAI 37.03), and a specific verdict form for use in comparative fault cases (MAI 37.07) (Pet. App. 37a). Yet, none of these principles applies to FELA cases, in which the FELA-specific rule concerning general verdicts is applied. Pet. App. 17a; see MAI 8.02 (Pet. App. 35a). There is no rational basis for Missouri to grant special verdicts to parties under state comparative negligence laws, but deny them to FELA defendants. *USDA* v. *Moreno*, 413 U.S. 528, 534 (1973). This Court has adopted the rule that "[a] state may not discriminate against rights arising under federal law" in its FELA jurisprudence, *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230 (1934), and this Court should reaffirm that rule here.

* * * *

The MAI that are binding in Missouri state courts in FELA cases defeat rational administration of federal law; prevent courts from conforming to the congressional directive to apply the common law "'as established and applied in the federal courts,'" *Urie*, 337 U.S. at 174; and draw the Missouri courts into sharp conflict with the precedents of this Court and of the federal courts of appeals. This Court should correct the Missouri court's negation of federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this Court may wish to consider summarily reversing the decision below.

Respectfully submitted,

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December 7, 2005

APPENDICES

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. ED84268

TIMOTHY SORRELL,
Respondent,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Joan M. Burger

Filed: July 5, 2005

Before George W. Draper III, C.J. and Kathianne Knaup Crane and Robert G. Dowd, Jr., JJ.

ORDER

PER CURIAM.

Timothy Sorrell (Sorrell) brought suit under the Federal Employer's Liability Act (FELA), 45 U.S.C.A. Section 51, *et seq*, against Norfolk Southern Railway (Norfolk). The trial court entered judgment in favor of Sorrell pursuant to a jury verdict of $1,500,000.00. Norfolk appeals the judgment asserting seven claims of error.

We have reviewed the briefs of the parties and the record on appeal and find the claims of error to be without merit. An

opinion reciting the detailed facts and restating principles of law would have no precedential value. However, the parties have been furnished with a memorandum for their information only, setting forth the reasons for this order. The judgment is affirmed in accordance with Rule 84.16(b).

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. ED84268

TIMOTHY SORRELL,
Respondent,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Joan M. Burger

Filed: July 5, 2005

Before George W. Draper III, C.J. and Kathianne Knaup Crane and Robert G. Dowd, Jr., JJ.

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for our order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Timothy Sorrell (Sorrell) brought suit under the Federal Employer's Liability Act (FELA), 45 U.S.C.A. Section 51, *et seq*, against Norfolk Southern Railway (Norfolk). The trial court entered judgment in favor of Sorrell pursuant to a jury verdict of $1,500,000.00. Norfolk appeals the judgment asserting seven claims of error. Finding no trial court error, we affirm the judgment.

Viewed in the light most favorable to the verdict, the following evidence was presented at trial. Sorrell worked as a trackman for Norfolk for twenty-seven years. On November 1, 1999, Sorrell was driving a dump truck owned by Norfolk on a county road in Kendallville, Indiana heading east toward the top of a hill. A second truck owned by Norfolk, driven by a Norfolk employee, was heading west toward Sorrell. The second truck did not noticeably slow down. Sorrell pulled as far to the side of the road as he could. As soon as the second truck passed, Sorrell tried to pull back onto the road and his truck slipped. The truck dropped down into a ditch and rolled over.

Sorrell suffered injuries to his back and neck. Sorrell did not return to work after November 1, 1999. Sorrell saw Dr. Stephen Ribaudo, an Indiana physician, from November 1999 to March 2000. In June 2001, Sorrell saw Dr. George Schoedinger, a Missouri physician who practices in St. Louis County, who determined Sorrell had ruptured disks in his neck and operated on Sorrell.

Sometime between October 2002 and December 2002, Dr. Schoedinger concluded Sorrell had reached maximum medical recovery. Dr. Schoedinger found that Sorrell could only do "light" physical demand work.

Norfolk provided health insurance for Sorrell. Sorrell's plan covered both he and his wife, who suffers from multiple sclerosis. Sorrell and his wife's health insurance through Sorrell's employment with Norfolk ended in December 2001.

Sorrell has not been employed since the November 1, 1999 injuries.

Sorrell brought suit against Norfolk under FELA for damages resulting from the injuries he suffered in the November 1, 1999 accident while working for Norfolk. The jury returned a verdict for Sorrell in the amount of $1,500,000.00, and the trial court entered judgment upon the jury's verdict.[1] Norfolk now appeals.

In its first point, Norfolk contends the trial court erred in giving Instruction No. 13, an affirmative defense instruction for FELA cases that was based on MAI 32.07(B). Norfolk contends MAI 32.07(B) misstates the causation standard for contributory negligence in a FELA case because MAI 32.07(B) instructs the jury to find the plaintiff negligent only if it concludes that his negligence "directly contributed to cause his injury" rather than caused his injury "in whole or in part," consistent with the verdict directing instruction for FELA cases contained in MAI 24.01. We disagree.

At trial, the trial court gave the following instruction, Instruction No. 13, patterned after MAI 32.07(B)[2]:

> You must find plaintiff contributorily negligent on his November 1, 1999 injury claim if you believe:

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[1] Plaintiff requested the jury to award him a total of $2,500,000.00 in damages.

[2] MAI 32.07(B), entitled Affirmative Defenses—Contributory Negligence—F.E.L.A., provides:

> You must find plaintiff contributorily negligent if you believe:
>
> First, plaintiff (characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"), and
>
> Second, plaintiff was thereby negligent, and
>
> Third, such negligence of plaintiff directly contributed to cause his injury.

(Footnotes omitted)

First, plaintiff either:

failed to stop his truck, or

failed to keep his truck on the roadway, and

Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

Norfolk also tendered an alternative modified instruction, Instruction No. A, on contributory negligence. In that instruction, Norfolk submitted the causation standard for Sorrell's contributory negligence as "negligence of plaintiff contributed in whole or in part to cause his injury." Norfolk based the causation standard in Instruction No. A on MAI 24.01, the verdict directing instruction in a FELA case for failure to provide a safe place to work.[3] The trial court rejected Norfolk's modified verdict directing instruction for contributory negli-

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[3] MAI 24.01 provides:

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce, and

Second, [with respect to such conditions for work,] defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe appliances, or

reasonably safe methods of work, or

reasonably adequate help, and

Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent, and

Fourth, such negligence resulted in whole or in part in [injury to plaintiff] [the death of (decedent's name)].

(Footnotes omitted.)

gence and submitted Instruction No. 13 patterned after MAI 32.07(8).

Norfolk contends that in a FELA case where contributory negligence is an issue, the causation standard should be the same as to the plaintiff and the defendant. However, Rule 70.02(b) provides that whenever "Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject." Here, the instruction patterned after MAI 32.07(B) was the correct instruction. MAI 32.07(B) has been determined to be the applicable instruction in cases such as the present case. Thus, we cannot convict the trial court of error in giving the applicable MAI as determined by the Supreme Court of Missouri. Point denied.

In its second point, Norfolk argues the trial court erred in admitting the expert testimony of Kevin Guss and evidence regarding the "replacement cost" of health insurance for Sorrell and his wife. We disagree.

We give substantial deference to a trial court's ruling regarding the admissibility of evidence and will not overturn such a decision unless the trial court abused its discretion. *Leake v. Burlington Northern R. Co.*, 892 S.W.2d 359, 362 (Mo. App. E.D. 1995). We presume discretionary rulings of a trial court are correct. *Id.* However, a trial court abuses its discretion when a ruling shock one's sense of justice, indicates a lack of consideration, and is clearly against the logic of the circumstances. *Id.*

At the trial, over Norfolk's objection, Sorrell offered the testimony of Kevin Guss, an insurance broker, to support his claim for damages attributable to the loss of the fringe benefit of health insurance. Guss testified that he could not find a replacement plan that would provide exactly the same benefits as those available through Sorrell's employment with

Norfolk. Guss explained that with Sorrell's preexisting conditions and his wife's multiple sclerosis it would be impossible to find private insurance coverage. Guss testified that the only insurance coverage Sorrell and his wife would qualify for was through the Indiana Comprehensive Health Insurance Association, which was a pool plan funded by all health insurers doing business in Indiana and offered to Indiana residents who cannot get insurance elsewhere. Guss explained that this insurance coverage would not be as good as the insurance coverage provided by Norfolk. Guss stated that to obtain coverage through this plan, Sorrell would have to pay a total of $165,389.45 for himself and $198,503.84 for his wife in monthly premiums through age sixty-four.[4]

Norfolk contends the evidence of the replacement cost of health insurance should not have been admitted because (1) Sorrell cannot recover damages for his wife's loss of health insurance, (2) replacement cost is not a proper measure of damages where FELA only permits recovery of actual pecuniary losses, (3) the claim for replacement cost was not reasonably certain, and (4) Kevin Guss's testimony lacked an adequate factual foundation.

Norfolk first contends Sorrell cannot recover damages for his wife's loss of health insurance. Norfolk cites to two cases holding that under FELA a spouse has no right to recover for loss of consortium as a result of employee's injuries. *See Dixon v. CSX Transp.. Inc.*, 990 F.2d 1440, 1442-43 (4th Cir. 1993); *Kelsaw v. Union Pacific Railroad Co.*, 686 F.2d 819, 820-21 (9th Cir. 1982). We find these cases inapposite to the present case. Here, Sorrell's wife did not file a separate loss of consortium claim. A loss of consortium claim is a separate, derivative action brought by an injured person's spouse for loss of the injured person's services, society, companionship, and sexual relations. *O'Neal v. Agee*, 8 S.W.3d 238, 242 (Mo.

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[4] At the time of the trial , Sorrel was forty-seven years old.

App. E.D. 1999). The action here was brought by Sorrell as an injured employee of Norfolk seeking damages for that injury and those damages include the loss of his fringe benefit of family health insurance which provides medical coverage for Sorrell's wife. The loss of an employee's stream of income comprises several elements, the most significant of which is the actual wage. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 534 (1984). In addition, the worker may have enjoyed certain fringe benefits which should be included in the evaluation of a worker's loss. *Id.*; *Maylie v. National Railroad Passenger Corp.*, 791 F.Supp. 477, 487-88 (1992). These fringe benefits include insurance coverage, pension and retirement plans, profit sharing, and in-kind services. *Jones & Laughlin Steel Corp.*, 462 U.S. at 534 n. 12. Here, Sorrell not only lost his wages but also his family health insurance and the value of that benefit is recoverable. There is no loss of consortium claim and Norfolk's argument is without merit.

Norfolk next contends the testimony concerning replacement costs of Sorrell and his wife's insurance was inadmissible because replacement costs are not the appropriate measure of damages where FELA only permits recovery of actual pecuniary losses. However, under these facts, we need not decide the issue of appropriate measure of damages for loss of fringe benefits.[5] Here, the trial court determined the evidence of replacement costs was relevant to the jury's calculation of damages. The evidence of replacement costs was not offered as the measure of damages, but as relevant evidence of how much it would cost Sorrell to replace health insurance

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[5] Moreover, if we were to accept Norfolk's position that in order to recover the cost of replacement health insurance, the plaintiff must actually purchased insurance, we believe it would disadvantage those who cannot afford to pay insurance premiums following the loss of employment. *See EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 902 (9th Cir. 1994.)

for himself and his wife. The ultimate test for damages is whether the award will fairly and reasonably compensate the plaintiff for his injuries. *Anderson v. Burlington Northern Ry. Co.*, 700 S.W.2d 469, 476 (Mo. App. E.D. 1985). Here, the evidence of replacement costs for health insurance for Sorrell and his wife was relevant to the jury's determination of what would fairly and reasonably compensate Sorrell for his injuries.

Norfolk also argues the claim for replacement cost was not reasonably certain and thus, the evidence of the replacement cost for Sorrell's family health insurance should not have been admitted. We agree that future damages are not compensable unless they are reasonably certain to occur. *Hobbs v. Harken*, 969 S.W.2d 318, 323 (Mo. App. W.D. 1998). The law requires that the evidence introduced must lay a foundation to enable the jury to make a fair and reasonable estimate of future damages and may not rest upon speculation. *Id.* Rather, future damages must be proved with reasonable certainty. *Id* "[R]easonable certainty contemplates and demands something more than a showing of contingent or speculative occurrences, possible or even probable developments, or conjecture, likelihood and probability." *Id.* (*quoting Thienes v. Harlin Fruit Co.*, 499 S.W.2d 223, 230 (Mo. App. 1973) (internal citations omitted)).

Here, the evidence of Sorrell's future damages for the loss of his family health insurance coverage was reasonably certain. Sorrell's family health insurance coverage with Norfolk expired. Sorrell was unemployed at the time of the trial. Sorrell does not have either a high school education or a GED. Other than his twenty-seven years with the railroads, Sorrell's employment experience consists of two and one-half years in the Navy and one year as a fireman. Both Sorrell and his wife have preexisting conditions. Sorrell has two fused discs in his neck and a bad back. Sorrell's wife has multiple sclerosis.

After his injury, Norfolk told Sorrell he could not return to his job as a trackman. When Sorrell failed to pass the tests given through Norfolk's vocational rehabilitation program, Norfolk told him that the railroad had no job for him. Sorrell has looked for work since his surgeon released him for "light work" in December 2002. Although Sorrell testified he was confident he would find a job, most of the jobs available to Sorrell were low-paying, unskilled jobs. There was no evidence as to any type of family health insurance coverage that could be provided from any potential employer.

Considering Sorrell's age, background, education level, and physical condition it is not speculative to find that he is reasonably certain to suffer future damage in the form of replacement costs for insurance. We believe the evidence shows it would in fact be more speculative to conclude Sorrell has a chance to find employment comparable to his employment at Norfolk prior to the injury given his circumstances. Under these facts, we find that a reasonable juror could find that it is a reasonable certainty that Sorrell will suffer future family health insurance replacement costs.

Finally, Norfolk claims Kevin Guss's testimony lacked an adequate factual foundation and should not have been admitted. Norfolk cites to three cases where it was determined that expert testimony concerning future damages was inadmissible because the evidence lacked an adequate foundation. *See Greer v. Continental Gaming Co.*, 5 S.W.3d 559 (Mo. App. W.D. 1999), *Hobbs*, 969 S.W.2d at 318, and *First National Bank of Fort Smith v. Kansas City Southern Ry. Co.*, 865 S.W.2d 719 (Mo. App. W.D. 1993). In *Greer*, an economist based his calculations upon the assumption that the plaintiff "would not be able to work for the next five or ten years, and would be unable to perform household services for the rest of her life." *Greer*, 5 S.W.3d at 566. The court found there was no evidentiary support for the assumptions made by the economist where the doctors testified that the plaintiff would

be able to work if she had her knee replaced and the plaintiff testified that she intended to have a knee replacement. *Id.*

In *Hobbs*, an economist relied on the representations of the plaintiff's counsel that the plaintiff's doctor would testify that the plaintiff's vestibular disorder would remain unchanged for twenty years when making his calculations for future lost earnings. *Hobbs*, 969 S.W.2d at 324-25. The court found the testimony was not supported by the evidence when the doctor actually testified that the plaintiff's condition "would improve or disappear with therapy and, perhaps, ultimately, with surgery." *Id.* at 325.

In *First National Bank of Fort Smith*, a "life care plan expert" testified that the plaintiff would need future attendant care at a cost of $1.8 million because the plaintiff would become a paraplegic or confined to a wheelchair. *First National Bank of Fort Smith*, 865 S.W.2d at 738. The court found the testimony was improperly admitted when there was no testimony that the plaintiff would become a paraplegic or be confined to a wheelchair. *Id*

We find these cases inapposite to the present case. Here, there was no testimony that Sorrell's position would change in such a manner to restore the fringe benefit of family health insurance coverage similar to that which was provided by Norfolk. With Sorrell's age, education level, and health condition, it is reasonably certain that he will suffer the loss of family health insurance. Thus, Kevin Guss's testimony of replacement costs was supported by a sufficient evidentiary foundation.

Because we find Sorrell can recover the damages for the loss of his family insurance benefits, the evidence of replacement costs presented at trial was relevant to the issue of Sorrell's damages, Sorrell's claim for replacement costs is reasonably certain, and there was a sufficient foundation for Guss's testimony, we must deny Norfolk's second point. Point denied.

In its third point, Norfolk asserts the trial court erred in excluding all evidence of Sorrell's wife's receipt of social security disability benefits and Medicare benefits. Norfolk contends the evidence of the benefits did not fall into the category of a collateral source, and, if the benefits were considered a collateral source, the evidence was admissible because Sorrell opened the door by presenting evidence of lack of health insurance. We disagree.

For the purpose of reducing or eliminating Sorrell's claim for damages for loss of the fringe benefit of family health insurance, Norfolk sought to cross-examine Sorrell's wife and Sorrell's health insurance broker to show that Sorrell's wife was receiving over $900.00 per month in social security disability benefits, and that some of her medical expenses were being paid by Medicare. The trial court refused to allow Norfolk to present such evidence because the evidence was inadmissible under the collateral source rule. The trial court specifically stated in making its ruling to exclude the evidence that "[a]s far as I know there is no evidence of their income or lack of income or how much income they have. And there is no evidence why they don't have medical insurance. If there had been something along that line my ruling would have changed."

Where evidence is excluded, the issue is whether or not the trial court abused its discretion, not whether the evidence was admissible. *Misischia v. St. John's Mercy Medical Ctr.*, 30 S.W.3d 848, 865 (Mo. App. E.D. 2000). A trial court abuses its discretion when the ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock one's sense of justice and indicates a lack of careful consideration. *Boyer v. Sinclair & Rush, Inc.*, 67 S.W.3d 627, 634 (Mo. App. E.D. 2002). We give substantial deference to the trial court's decision to admit or exclude evidence because of its superior opportunity to evaluate the proffered evidence in the context of the trial. *Misischia*, 30 S.W.3d at

865. We will affirm the trial court's evidentiary ruling unless there is a substantial or glaring injustice. *Uxa ex rel. Uxa v. Marconi*, 128 S.W.3d 121, 130 (Mo. App. E.D. 2003). To reverse, we must find that the trial court's error in excluding evidence was prejudicial and not harmless and that the error materially affected the merits of the action. *Whitworth v. Jones*, 41 S.W.3d 625, 627 (Mo. App. E.D. 2001). A ruling within the trial court's discretion is presumed correct, and the appellant bears the burden of showing abuse of discretion and prejudice. *Boyer*, 67 S.W.3d at 634.

Here, we cannot convict the trial court of error in excluding evidence of Sorrell's wife's receipt of social security disability benefits and Medicare. Without determining whether Sorrell's wife's receipt of social security disability benefits and Medicare fall within the collateral source rule, we agree with the trial court that such evidence was not relevant to the loss of Plaintiff's fringe benefit of family health insurance. Sorrell was entitled to seek recovery for the loss of his fringe benefit of family health insurance and to seek the same level of coverage lost as a result of his injury while employed with Norfolk. Benefits received by Sorrell's wife could not be used to reduce his damages for the loss of his fringe benefits.

Moreover, even if Sorrell's wife's receipt of social security disability benefits and Medicare was considered to be a collateral source, we cannot say that Sorrell opened the door to allow the admission of the benefits evidence. Generally, the purpose of the collateral source rule is to prevent a wrongdoer from mitigating damages by proving that payments were made to a person from a collateral source. *Buatte v. Schnuck Markets, Inc.*, 98 S.W.3d 569, 573 (Mo. App. E.D. 2002). A plaintiff opens the door for the admission of such evidence, if the plaintiff injects his financial condition into the proceedings and implies financial distress, the defendant may rebut this by showing the plaintiff had other financial assistance available. *Moore v. Missouri Pacific R. Co.*, 825 S.W.2d 839,

843 (Mo. banc 1992). Here, there was no direct evidence that Sorrell's wife did not have insurance at the time of trial. The testimony alluded to by Norfolk did not open the door for the admission of the evidence. Both Sorrell and his wife testified that their health insurance through Norfolk had expired. This evidence was relevant in proving Sorrell's claim for loss of his fringe benefit of family health insurance. The testimony does not directly relate to their present financial condition concerning health insurance or imply financial distress. Furthermore, while Sorrell did testify that he did not have health insurance at the time of the trial, this did not open the door to the fact that his wife was receiving social security disability benefits and Medicare. Moreover, counsel for Norfolk, when questioning Kevin Guss, directly asked whether the Sorrells had insurance coverage at the time of the trial, to which Kevin Guss responded that he did not know their situation at that time. While Kevin Guss did not specifically say that the Sorrells were not covered by health insurance at the time of the trial, this questioning was initiated by Norfolk. Therefore, Sorrell cannot be charged with opening the door to the introduction of such evidence.

Finally, Norfolk directs this court to statements made by Sorrell's counsel in his closing argument where he said the Sorrells had been "cut off" from health insurance and that "[t]hey don't have health insurance." However, statements made in closing arguments are not deemed evidence, *Rudin v. Parkway School Dist.*, 30 S.W.3d 838, 842 (Mo. App. E.D. 2000), and should not be considered to determine whether a plaintiff has opened the door to the admission of inadmissible evidence. The trial court did not abuse its discretion in excluding evidence that Sorrell's wife received social security disability benefits and Medicare benefits. Point denied.

In its fourth point, Norfolk claims the trial court erred in excluding evidence of Sorrell's receipt of $1,800.00-$1,900.00 per month in railroad disability benefits. Norfolk contends

Sorrell opened the door for the evidence by testifying that he and his wife had no health insurance and no means to pay medical costs. We disagree.

During pre-trial proceedings in *limine*, the trial court instructed Norfolk not to raise any issues regarding Sorrell's receipt of disability benefits. At the trial, Norfolk made an offer of proof, questioning Sorrell outside the hearing of the jury. Sorrell testified that he received Railroad Retirement disability benefits of $1,800.00 to $1,900.00 per month since November of 2000. Norfolk explained that it wanted to offer this testimony to the jury to respond to Sorrell's claims for replacement cost of insurance benefits and to correct the impression given to the jury that Sorrell and his wife have no insurance coverage and no income. The trial court ruled the evidence was inadmissible under the collateral source rule.

The United States Supreme Court in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), held evidence that the plaintiff is receiving disability payments under the Railroad Retirement Act is inadmissible. *Id.* at 254-55. The Court noted that those benefits "are not directly attributable to the contributions of the employer" and are "inadmissible to offset or mitigate damages." *Id.* at 254. In *Eichel*, the Court stated the likelihood of misuse by the jury clearly outweighed the value of such evidence. *Id.*

Again, the rule against collateral source in a FELA case is not absolute. If the plaintiff injects his financial condition into the proceedings and implies financial distress, the defendant may rebut this by showing the plaintiff had other financial assistance available. *Moore*, 825 S.W.2d at 843 (*citing Gladden v. P. Henderson & Co.*, 385 F.2d 480 (3rd Cir. 1967) and *Lange v. Missouri Pacific R.R. Co.*, 703 F.2d 322 (8th Cir. 1983)). The evidence of other financial assistance may be used for the narrow purpose of testing the credibility of the plaintiff's assertion regarding financial distress. *Leake*, 892 S.W.2d at 363.

Here, we find no statements injecting Sorrell's financial condition into the case so as to allow an opportunity of Norfolk to rebut with evidence of collateral source payments. Norfolk again claims Sorrell opened the door when he stated that he did not have health insurance coverage at the time of the trial. The statements alluded to by Norfolk do not imply any financial distress for the purpose of appealing to the jury's sympathy to increase the award of damages. *See Mateer v. Union Pacific Systems*, 873 S.W.2d 239, 245 (Mo. App. E.D. 1993). We find no abuse of discretion in excluding the evidence of collateral source payments. Point denied.

In its fifth point, Norfolk asserts the trial court erred in submitting Instruction No. 14 and Verdict Form B, based on MAI 8.02 and MAI 36.01. Norfolk contends that by not requiring the jury to make a specific finding as to each party's percentage of fault, the instructions violate Norfolk's due process and equal protections rights. Norfolk further claims that the instructions violate the Supremacy Clause and there is no rational basis for treating FELA verdicts differently from common law negligence claims. We disagree.

In most Missouri cases involving comparative fault, the jury is asked to determine a total amount of damages and the percentage of fault of the plaintiff and the defendant, and the jury is told that the judge will reduce the total damages awarded by the percentage of fault attributed to the plaintiff. *See* MAI 37.07. FELA, however, requires that the jury rather than the judge diminish the total damages by the comparative fault of the plaintiff. 45 U.S.C.A. Section 53. For this reason, the jury in FELA cases is instructed that after it determines the sum of damages to which it believes the plaintiff is entitled as a result of the defendant's conduct that "[i]f you find plaintiff contributorily negligent as submitted in Instruction Number ___, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff." MAI 8.02.

Here, Instruction No. 14, modeled after MAI 8.02, was submitted to the jury. The verdict form submitted was patterned after MAI 36.01, which is the verdict form for a plaintiff alleging personal injuries against a defendant. MAI 36.01 does not provide for assessment of percentages of fault to be listed on the verdict form in contrast to MAI 37.07 where the jury records its assessment of percentages of fault on the verdict form.

Norfolk maintains the distinction between how the jury records its damage verdict in FELA and non-FELA cases constitutes unconstitutional discrimination against FELA cases in violation of the Supremacy Clause. This identical issue was raised and denied in *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813 (Mo. banc 2000).

Norfolk also asserts due process and equal protection violations in that the parties and appellate courts have no means of determining whether the jury properly reduced total damages by plaintiff's fault or whether it correctly made mathematical computations in diminishing total damages by the amount of plaintiff's negligence.[6] Norfolk urges that this denies meaningful judicial review. Norfolk, however, has not provided this court with any authority convincing us of a constitutional dilemma in MAI 8.02 and MAI 36.01. Accordingly, Norfolk's constitutional arguments are rejected. We will not convict the trial court of error in submitting an instruction reproducing the required MAI as set forth by the Supreme Court of Missouri. Point denied.

In its sixth point, Norfolk contends the trial court erred in allowing Sorrell to present evidence that his wife suffers from multiple sclerosis. Norfolk maintains the nature of Sorrell's wife's medical condition was irrelevant and prejudicial. We disagree.

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[6] Identical claims were asserted in the *Giddens* case. The Court, however, declined to address these constitutional issues because they had not been properly preserved for appeal. *Giddens*, 29 S.W.3d at 823.

Initially, we note that when Sorrel was asked at trial if his wife had multiple sclerosis, Norfolk did not object. Furthermore, Sorrell's wife was present throughout the trial and testified from her wheelchair on Sorrell's behalf.

Norfolk cites to four cases to support its argument that evidence of Sorrell's wife's multiple sclerosis was irrelevant and highly prejudicial as an appeal to the sympathy of the jurors. *See Golian v. Stanley*, 334 S.W.2d 88, 91 (Mo. 1960) (evidence of number of members in plaintiff's family improper in personal injury actions); *Meade v. Kansas City Public Service Co.*, 250 S.W.2d 513, 515-16 (Mo. 1952) (evidence of number of members in plaintiff's family improper in personal injury actions); *Minneapolis, St. P. & S.S.M. Ry. Co. v. Moquin*, 283 U.S. 520, 521 (1931) (reversing a FELA verdict where it appeared the verdict was based on emotional appeals to jurors); and *Chicago, St. P., & M. & 0. R. Co.*, 160 F.2d 1002, 1008 (8th Cir. 1948)(improper statements regarding action of the railroad to appeal to the sympathy of the jury).

We are not persuaded, under any of the cases cited by Norfolk, that the trial court abused its discretion in allowing evidence of Sorrell's wife's condition. Here, the evidence of Sorrell's wife's multiple sclerosis was relevant to the loss of Sorrell's fringe benefit of health insurance and outweighs any possible prejudice. We cannot say the trial court abused its discretion in allowing the evidence to be presented to the jury. Point denied.

In its seventh and final point, Norfolk argues the trial court erred in denying its motion to dismiss for forum non conveniens. Norfolk maintains there was no nexus between Sorrell, an Indiana resident, and his accident in Indiana and the City of St. Louis. Norfolk contends the City of St. Louis was not the appropriate place to have this trial pointing out that the accident occurred in Kendallville, Indiana, which is 317 miles from the City of St. Louis, only two witnesses, including

Sorrell's treating orthopedic surgeon, Dr. Schoedinger, were Missouri residents, and Sorrell is a resident of Indiana and Norfolk is headquartered in Virginia. We disagree.

Norfolk, however, failed to include this claim of error in its motion for new trial. Allegations of error, including the denial of a motion to dismiss for *forum non conveniens*, must be included in a motion for new trial in order to be preserved for appellate review. Rule 78.07. Thus, we review for plain error only. Rule 84.13(c).

The doctrine of *forum non conveniens* is designed to prevent a plaintiff from using a venue statute to vex, oppress, or harass a defendant by bringing a suit in a forum unrelated to the parties or the cause of action. *Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298, 302 (Mo. banc 1992). However, a plaintiff's choice of forum is not to be disturbed except for "weighty reasons" and the case should be dismissed only if the "balance is strongly in favor" of the defendant. *Id.*

In determining whether to apply the doctrine on *forum non conveniens* in a given case, trial courts are guided by six primary factors: (1) place of accrual of the cause of action; (2) location of the witnesses; (3) the residence of the parties; (4) any nexus with the place of the suit; (5) the public factor of the convenience to and burden upon the court; and (6) the availability to the plaintiff of another court with jurisdiction of the cause of action affording a forum for the plaintiff's remedy. *Anglim*, 832 S.W.2d at 302. Because the application of the doctrine of *forum non conveniens* is fact intensive and the weight to be accorded any factor is dependent on the circumstances, trial court discretion is essential. *Id.* at 303. In determining whether the trial court's ruling amounted to an abuse of discretion, only those facts will be considered that were before the trial court when it ruled on the motion to dismiss, and the evidence will be viewed in a light favorable to the result of the trial court. *Id.* On appeal, discretionary

rulings are presumed correct, and the appellant bears burden of showing an abuse of discretion. *Id*

Here, the trial court made a specific finding that "[Norfolk] has failed to show that a trial of this case in St. Louis, will result in such oppression that [Sorrell's] choice of forum should be disregarded" Norfolk has not overcome this ruling and failed to meet its burden of showing the trial court abused its discretion. Moreover, the fact that Sorrell's treating physician practiced in St. Louis and that Norfolk engaged as a common carrier in Missouri provides a sufficient nexus to the City of St. Louis. *See Euton v. Norfolk & Western Ry. Co.*, 936 S.W.2d 146, 154 (Mo. App. E.D. 1996)(the fact that plaintiff's treating physician practiced in St. Louis and that the railroad engaged as a common carrier in Missouri provided a sufficient nexus to Missouri, even where most of the events took place outside of Missouri). We find no error, plain or otherwise. Point denied.

The judgment is affirmed.

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APPENDIX B

STATE OF MISSOURI } SS
CITY OF ST. LOUIS }

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

FILED

NOV 0 7 2003

MARIANO V. FAVAZZA
CIRCUIT CLERK
BY DEPUTY CLERK

Timothy Sorrell

Plaintiff(s),

vs.

Norfolk Southern Railway Company

Defendant(s).

Cause No. 012-8583

Division No. 13

JUDGMENT

This action came before this Court and a Jury. The parties appeared in person and by their respective attorneys. The issues have been duly tried and the Jury rendered its verdict(s).

VERDICT A

Whereas, on the claim of Tim Sorrell (Plaintiff/Defendant) for the October 20, 1999 injury against Norfolk Southern Railway Company (Plaintiff/Defendant) [the Jury found in favor of the (Plaintiff), (Defendant)] (and/or) [the Jury assessed the percentages of fault as follows:]

_____ _____%

_____ _____%

_____ _____%

_____ _____%

_____ _____%

100%

The Jury found the total damages of (Plaintiff) (Defendant), disregarding any fault on the part of (Plaintiff), (Defendant), to be $ _____ Dollars and _____ Cents.

WHEREFORE, it is hereby ordered and adjudged that _____

_____

have and recover of:

_____ $ _____

_____ $ _____

_____ $ _____

_____ $ _____

_____ $ _____

VERDICT B

Whereas, on the claim of Tim Sickels for
Plaintiff/Defendant
the November 6, 1999 injury against
Norfolk Southern Railway Company [the Jury found in
Plaintiff/Defendant
favor of the (Plaintiff), (Defendant)] (and/or) [the Jury assessed the percentages of fault as follows:]

_____ _____%

_____ _____%

_____ _____%

_____ _____%

_____ _____%

100%

The Jury found the total damages of (Plaintiff) (Defendant), disregarding any fault on the part of (Plaintiff), (Defendant), to be $ 1,500,220 Dollars and 00 Cents.

WHEREFORE, it is hereby ordered and adjudged that Plaintiff Timothy Sawell

have and recover of:

Defendant Norfolk Southern Ry. Co.	$ 1,500,000.00
	$
	$
	$
	$

[Cost of this action to be taxed against the (Plaintiff(s)), (Defendant(s)) or (Apportioned)].

44931
Attorney for Plaintiff, Bar#
100 South Fourth Street Suite 900
Address St Louis, MO 63102
314-621-6115
Phone #

44596
Attorney for Defendant, Bar#
One US Bank Plaza, Suite 2400
Address
314 552-6000
Phone #

SEAL of the CIRCUIT COURT

SO ORDERED:

James M Bruggers
Judge, Division No. 13
Judge No. 24764

IN TESTIMONY WHEREOF, I Have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis, this 7 day of November, 2003

MARIANO V. FAVAZZA
Circuit Clerk
By: V. Payne
Deputy Clerk

[ ] see attached supplemental judgment form(s) which is/are made a part hereto.

APPENDIX C

VERDICT A

Note: Complete this form by writing in the name required by your verdict.

On the October 20, 1999 claim of plaintiff Timothy Sorrell for personal injuries against defendant Norfolk Southern Railway Company, we, the undersigned jurors, find in favor of:

Timothy Sorrell (Plaintiff Timothy Sorrell) or _____ (Defendant Norfolk Southern Railway Company

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Timothy Sorrell.

We, the undersigned jurors, assess the damages of plaintiff Timothy Sorrell at

$ — 0 —

FILED
NOV 07 2003
MARIANO V. FAVAZZA
CIRCUIT CLERK
BY DEPUTY CLERK

Note: All jurors who agree to the above findings must sign below.

VERDICT B

Note: Complete this form by writing in the name required by your verdict.

On the November 1, 1999 claim of plaintiff Timothy Sorrell for personal injuries against defendant Norfolk Southern Railway Company, we, the undersigned jurors, find in favor of:

Timothy Sorrell
(Plaintiff Timothy Sorrell) or _____ (Defendant Norfolk Southern Railway Company)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Timothy Sorrell.

We, the undersigned jurors, assess the damages of plaintiff Timothy Sorrell at

$ 1,500,000.00

FILED
NOV 0 7 2003
MARIANO V. FAVAZZA
CIRCUIT CLERK
BY DEPUTY CLERK

Note: All jurors who agree to the above findings must sign below.

Elizabeth Bragg
James Mund
James Haggerty
Julie Ridley
Richard Crafton
Beverly Harris
Anita Bryant
Jacqueline M. Powell

APPENDIX D

IN THE EASTERN DISTRICT COURT OF APPEALS
CITY OF ST. LOUIS

Cause No. 012-8583

TIM SORRELL,
Plaintiff-Respondent,
vs.
NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellant.

Before the Honorable Joan M. Burger

TRANSCRIPT ON APPEAL
November 3-7, 2003

Attorney for Plaintiff:
Paul Slocomb,
Attorney at Law

Attorneys for Defendant:
David Dick,
Tom Alvey,
Attorneys at Law

Joanne J. Martin #169
Official Court Reporter
22nd Judicial Circuit

* * * *

[574] MR. SLOCOMB: None for plaintiff.

MR. DICK: Judge, I do have some non-M.A.I. instructions to tender.

Defendant tenders these understanding that they're not M.A.I. instructions, but in order to preserve the record on the issues.

The first of those, Judge, is—we'll tender as Instruction A—

THE COURT: Uh-huh.

MR. DICK:—and that is, Judge—and, Judge, how this does not conform to M.A.I., it tracks 32.07(B), the comparative fault instruction, with the exception of paragraph third.

THE COURT: In whole or in part.

MR. DICK: Yes. M.A.I. approved 32.07(B), paragraph third, modified in light of language of 45 U.S.C. Sections 51 and 53 FELA pure comparative fault system.

This gives basically the causation of standard negligence of plaintiff directly contributing to his injury.

Instruction A that we have tendered says, "Third, such negligence of plaintiff contributed in whole or in part to cause his injury."

We believe this alternative instruction [575] should be used in that this M.A.I. is an incorrect statement of law under FELA, Sections, 45 United States Code, 51 and 53.

Section 51 does refer to the in whole or in part standard. Section 53 refers to comparative fault of the plaintiff and the statutory system.

There are enumerable cases in the Statutes that refer to it, a pure comparative fault system.

And I think the current M.A.I. instruction has a different causation standard for comparative fault, meaning that under 32.07 we must prove that such negligence of plaintiff directly contributed to cause the injury.

I believe that misstates the law because that is a different standard.

This instruction requires the defendant to prove in a comparative fault case that comparative fault directly contributed to cause the injury, which I believe is a much more

exacting standard than in whole or in part, which is what the plaintiff's verdict director states.

For those reasons I stated and looking at the language of the Statutes on the comparative fault system, we believe 32.07 misleads the, or misstates the law.

[576] THE COURT: The Court refuses to give that instruction since it's not in M.A.I.

I would suggest you bring case law and Statutes before the Jury Instruction Committee of the Supreme Court on this issue.

MR. DICK: Then our other issue, Judge, our other non-M.A.I. instruction is a Constitutional objection.

We may have a pleading to file with the Court. Again, this is a series of non-M.A.I. instructions.

We understand are not M.A.I. instructions. We're filing this pleading to make clear for the record the basis of our Constitutional objection under the Equal Protection Clause of the Fifth Amendment of the United States Constitution as incorporated against the States in the Fourteenth Amendment and the Supremacy Clause in the United States Constitution. All of this is referred to in our memo.

And, Judge, the explanation of the basis of our objection is that the Missouri system of instructing the jury in FELA cases requires the jury to make comparative fault determinations without writing then on a verdict form.

[577] It requires them to do the comparative fault and make their comparative fault reduction in their heads and never ever commit it to paper.

And we believe, as stated in our brief, which I won't read the whole thing, it's eight pages long, we believe that system is unconstitutional for the reasons stated, because it treats railroads and FELA cases differently from any other tort

defendant in any other kind of case in that the jury does not actually write down fault for the defendant or the plaintiff.

No Appellate Court or Trial Court ever knows what the jury's decision is on comparative fault or doesn't really know what their decision is on damages, because the jury does not reach a gross damage decision and does not write down any comparative fault.

For all those reasons stated, Judge, we believe that the system is unconstitutional.

THE COURT: That objection is filed and noted on the record. And you have some substitute instructions on those issues?

MR. DICK: Yes.

THE COURT: The objection is overruled.

MR. DICK: Judge, the way in which we would [578] propose that the instructions be tendered is a modified M.A.I.

Judge, Instruction B is a modified M.A.I. 8.02 damage instruction modified simply to delete the last sentence, that last sentence instructing the jury to make a comparative fault reduction in their heads.

Then, Judge, we tendered defendant's Instruction C, which is a verdict form patterned after M.A.I. 36.07, which is the verdict form used for any other comparative fault negligence case in Missouri.

And what this verdict form does, it would have the jury determine the fault of Mr. Sorrell and determine the fault of Norfolk Southern and assess the total damages.

THE COURT: So that objection is overruled. Instruction B and verdict form C are refused. Off the record.

* * * *

APPENDIX E

IN THE SUPREME COURT OF MISSOURI

SC87089
ED84268

September Session, 2005

TIMOTHY SORRELL,
Respondent,

vs. (TRANSFER)

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant.

Now at this day, on consideration of the Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2005, and on the 20th day of September, 2005, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 20th day of September, 2005.

/s/ Thomas F. Simon Clerk

_____ D.C.

APPENDIX F

[Logo]

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

DATE: August 22, 2005

RE: Motions For Rehearing And/Or Transfer To Supreme Court Denied

1. ED84268 TIMOTHY SORRELL, RES V NORFOLK SOUTHERN, APP

2. ED85136 STEVEN SPIER, APPELLANT V STATE OF MISSOURI, RES

APPENDIX G

FEDERAL EMPLOYERS' LIABILITY ACT (excerpts)

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

APPENDIX H

MISSOURI APPROVED JURY INSTRUCTIONS*

8.02 [1996 Revision] Damages—F.E.L.A.—Injury to Employee

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future] as a result of the occurrence mentioned in the evidence. Any award of future pecuniary damages must be included at present value. [Any award you make is not subject to income tax.] [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number _____, in determining plaintiff's total damages you must not include those damages which would not have occurred without such failure.] [If you find plaintiff contributorily negligent as submitted in Instruction Number _____, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff.]

24.01 [1992 Revision] Verdict Directing—F.E.L.A.—Failure to Provide Safe Place to Work

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce, and

Second, [with respect to such conditions for work,] defendant either failed to provide:

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* Footnotes and accompanying "Notes on Use" have been omitted.

reasonably safe conditions for work, or reasonably safe appliances, or reasonably safe methods of work, or reasonably adequate help, and

Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent, and

Fourth, such negligence resulted in whole or in part in [injury to plaintiff] [the death of (*decedent's name*)].

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number _____ (*here insert number of affirmative defense instruction*)].

32.07(B) [1996 Revision]—Affirmative Defenses—Contributory Negligence—F.E.L.A.

You must find plaintiff contributorily negligent if you believe:

First, plaintiff (characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"), and

Second, plaintiff was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

36.01 [1980 Revision] Form of Verdict—Plaintiff vs. Defendant—Personal Injuries Only

VERDICT _____

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff (*state the name*) for personal injuries against defendant (*state the name*), we, the undersigned jurors, find in favor of:

_____

(Plaintiff (state the name)) or (Defendant (state the name))

Note: Complete the following paragraph only if the above finding is in favor of plaintiff (*state the name*).

We, the undersigned jurors, assess the damages of plaintiff (*state the name*) at $_____ (*stating the amount*).

Note: All jurors who agree to the above findings must sign below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

37.07 [1986 New] Comparative Fault—Form of Verdict—Plaintiff vs. Defendant

VERDICT _____

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff (*state the name*) for personal injury, we, the undersigned jurors, assess percentages of fault as follows:

Defendant	(state the name)	_____%	(zero to 100%)
Plaintiff	(state the name)	_____%	(zero to 100%)
	TOTAL	_____%	(zero *OR* 100%)

Note: Complete the following paragraph if you assessed a percentage of fault to defendant:

We, the undersigned jurors, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be $_____ (stating the amount).

Note: The judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Note: All jurors who agree to the above must sign below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____